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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1748**

State of Minnesota,
Respondent,

vs.

Benjamin Robert Hovorka,
Appellant.

**Filed July 31, 2017
Affirmed
Rodenberg, Judge**

Anoka County District Court
File No. 02-CR-16-700

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Anthony C. Palumbo, Anoka County Attorney, Nicholas M. Jannakos, Special Assistant
County Attorney, Anoka, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Michael McLaughlin, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Rodenberg, Judge; and
Jesson, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

Appellant Benjamin Robert Hovorka challenges the sufficiency of his guilty plea to
fourth-degree sale of a controlled substance, arguing that he did not “sell” fentanyl to his

girlfriend, as proscribed by Minn. Stat. § 152.024, subd. 1(1) (2014), because he and his girlfriend jointly acquired and possessed the drug. We affirm.

FACTS

On January 28, 2016, law enforcement responded to a 911 call regarding a woman who was not breathing. Deputies arrived to find appellant's girlfriend, A.W., receiving cardiopulmonary resuscitation. She had overdosed after drinking the medication inside of a fentanyl patch. Appellant admitted to obtaining fentanyl patches from a friend and bringing them home. He and A.W. did Internet research to determine how to get high from the patches. Fentanyl patches were recovered from the scene, and one unopened patch was recovered from appellant's car.

Appellant was charged with one count of fourth-degree sale of a controlled substance, and one count of fifth-degree possession of a controlled substance. In March 2016, he pleaded guilty to the charge of fourth-degree sale in exchange for the state dismissing the fifth-degree-possession charge.

In establishing a factual basis for his plea, appellant testified at the plea hearing that he was at his girlfriend's house on January 28, 2016. One day earlier, he had "acquired fentanyl patches" from a coworker. He acquired the patches "because [he] was going through neck pain." He tried the patches and "ended up cutting one of the fentanyl patches open and eating the liquid out of it." He stated that A.W. "ended up acquiring more of them as well" for appellant. Neither appellant nor A.W. had a prescription for the patches. Appellant was asked, "When you brought them home, did you give one of them to [A.W.]?" He responded, "Yes." She "drank the patch," and began "losing consciousness."

Appellant told law enforcement that he had other fentanyl patches in his car. He was asked, “And was that for you to use, or were you going to give that away?” He responded, “That was for me to use.” The district court accepted the plea and sentenced appellant to 36 months in prison.

This appeal followed.

DECISION

Appellant challenges the sufficiency of his guilty plea. A district court must permit a defendant to withdraw a guilty plea “if withdrawal is necessary to correct a ‘manifest injustice.’” *State v. Raleigh*, 778 N.W.2d 90, 93 (Minn. 2010) (quoting Minn. R. Crim. P. 15.05, subd. 1). A manifest injustice exists if a guilty plea is invalid. *Id.* at 94. To be valid, “a guilty plea must be accurate, voluntary, and intelligent.” *Id.* We review the validity of a guilty plea de novo. *Id.*

Appellant argues that his plea was inaccurate because the record does not establish that a “sale” occurred. The purpose of the accuracy requirement is to prevent a defendant from pleading guilty to a more serious offense than he could be convicted of at trial. *State v. Trott*, 338 N.W.2d 248, 251 (Minn. 1983). A guilty plea is inaccurate if it is not supported by a sufficient factual basis. *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). A sufficient factual basis exists if there are “facts on the record to support a conclusion that [the] defendant’s conduct falls within the charge to which he desires to plead guilty.” *State v. Iverson*, 664 N.W.2d 346, 349 (Minn. 2003) (quotation omitted). An adequate factual basis must establish all of the elements of the crime. *Barnslater v. State*, 805 N.W.2d 910, 914 (Minn. App. 2011).

In order to be guilty of fourth-degree sale, appellant must have sold “one or more mixtures containing a controlled substance classified in Schedule I, II, or III, except marijuana or Tetrahydrocannabinols.” Minn. Stat. § 152.024, subd. 1(1). Appellant does not dispute that fentanyl is a Schedule II controlled substance. See Minn. Stat. § 152.02, subd. 3(c)(10) (Supp. 2015). The issue is whether his actions constituted a sale. The term “sells,” as used in section 152.024, is defined in relevant part as “to sell, give away, barter, deliver, exchange, distribute or dispose of to another, or to manufacture.” Minn. Stat. § 152.01, subd. 15a(1) (2014).

Appellant relies on two cases, *State v. Carithers*, 490 N.W.2d 620 (Minn. 1992) and *Barrow v. State*, 862 N.W.2d 686 (Minn. 2015), to argue that his actions did not constitute a sale. In *Carithers*, which involved two consolidated cases, the following certified question was posed: “When a married couple jointly acquires a Schedule I controlled substance, and one of the partners uses that substance and subsequently dies from a drug overdose, did the legislature intend that the surviving partner be subject to prosecution [for third-degree controlled-substance murder]?” 490 N.W.2d at 620. The facts at issue in *Carithers* were as follows:

(a) A friend gave defendant Gladwin and his wife a ride to the place of purchase. Gladwin bought two “papers” of heroin, while his wife and the friend waited in the car. They took the heroin to the Gladwin home. Gladwin prepared the syringes, keeping one for himself and giving one to his wife. Gladwin “shot up” himself, and his wife “shot up” at the same time. She passed out and died of a drug overdose.

(b) Defendant Carithers went by herself to buy the heroin, but it appears undisputed that she was buying not just for herself but for her husband also. She brought the heroin

home and used her half. After showing her husband where she hid the heroin, she left the house. During her absence, her husband prepared a syringe and injected himself. He too died of an overdose.

Id. at 621. The supreme court held that criminal liability for third-degree controlled-substance murder could not be imposed where there was “joint acquisition and possession of drugs under circumstances where neither defendant’s conduct [could] be fairly characterized as involving a sale or transfer or delivery to the person who died.” *Id.* at 622, 624.

Appellant’s acts are distinguishable from those in *Carithers*. Here, the record establishes that the fentanyl given by appellant to A.W. was not jointly acquired. Appellant stated that he had “acquired fentanyl patches” from a coworker because he “was going through neck pain.” The following exchange took place during appellant’s plea:

Q. How did you get those fentanyl patches?

A. From a co-worker of mine. He was watching me go through pain and he goes, here, try these out, and they might work for you. So I acquired them and I tried them out, and then I ended up cutting one of the fentanyl patches open and eating the liquid out of it.

He testified that the patch in his car, which was turned over to law enforcement, was for his own use. And although appellant did state that A.W. obtained some other patches, he testified in support of his plea that A.W. consumed fentanyl from a patch he had acquired and given to her. The record admits of no conclusion other than that A.W. received directly from appellant the fentanyl patch which she consumed. We conclude that appellant’s testimony sufficiently establishes that he gave a fentanyl patch to A.W., an act that qualifies

as a sale under the plain language of the statute. *See* Minn. Stat. § 152.01, subd. 15a(1) (defining “sell” as including to “give away”).

The supreme court emphasized in *Carithers* that it was “not dealing with a case of ‘sharing’ of one’s individually acquired drugs with another person.” 490 N.W.2d at 624. “Rather,” the court stated, “we are dealing with joint acquisition and possession of drugs under circumstances where neither defendant’s conduct can be fairly characterized as involving a sale or transfer or delivery to the person who died.” *Id.* There was no transfer in *Carithers* because both partners jointly possessed the drugs from the moment of acquisition. *Id.* at 622. This case involves a transfer. Appellant individually acquired some patches for himself, and he subsequently transferred a patch to A.W., who consumed the drug contained in that patch, resulting in her overdose.

Appellant argues that the patches were jointly acquired and that *Carithers* holds that joint acquisition “merely requires a common effort to obtain the drugs.” But he fails to explain how his acquisition of patches involved a common effort. He asserts that the facts in *Carithers* show that the “defendants obtained the drugs independently.” But the certified question posed in *Carithers* involved joint acquisition by a married couple. The supreme court, in narrowing its holding, specifically stated that “in the instant case we must assume, given the phrasing of the certified question and the apparently undisputed facts, that each of the defendants acquired the heroin jointly with his or her spouse.” *Id.* at 623. Here, appellant testified that he obtained the very patch from which A.W. consumed the fentanyl; he transferred it to A.W., thereby serving “as a link in the chain of distribution.” *See id.* (quotation omitted).

Appellant also relies on *Barrow*, a case in which the supreme court allowed a defendant to withdraw his guilty plea to sale of a controlled substance, because his admission that he gave cocaine to his wife so she could hide it did not constitute a “sale.” 862 N.W.2d at 687. The *Barrow* case is readily distinguishable from this case. *Barrow* involved only a temporary relinquishment; the defendant gave cocaine to his wife, not for her to use, but so that she could hide it. *Id.* at 690. Because the defendant in *Barrow* only gave his wife temporary control of the drug, the “give away” portion of section 152.01, subdivision 15a(1) was not satisfied. *Id.* Here, appellant’s act of giving away the patch to A.W. was not a temporary relinquishment; she was given a patch, not to hide, but to consume. Consume it she did, resulting in her overdose.

Appellant admitted to conduct amounting to a sale, as that term is statutorily defined. He gave a fentanyl patch to A.W. The fentanyl that he gave A.W. was not jointly acquired, nor was his delivery of the fentanyl to A.W. a temporary relinquishment. Appellant’s guilty plea is accurate and sufficient.

Affirmed.